

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTINE BRECKENRIDGE,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting  
Commissioner of Social Security,<sup>1</sup>

Defendant.

No. 2:20-cv-1915 DB

ORDER

This social security action was submitted to the court without oral argument for ruling on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment.<sup>2</sup> Plaintiff's motion argues that the Administrative Law Judge erred with respect to the treatment of the medical opinion evidence and plaintiff's testimony, as well as by failing to adequately develop the record.

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<sup>1</sup> After the filing of this action Kilolo Kijakazi was appointed Acting Commissioner of Social Security and has, therefore, been substituted as the defendant. See 42 U.S.C. § 405(g) (referring to the "Commissioner's Answer"); 20 C.F.R. § 422.210(d) ("the person holding the Office of the Commissioner shall, in his official capacity, be the proper defendant").

<sup>2</sup> Both parties have previously consented to Magistrate Judge jurisdiction over this action pursuant to 28 U.S.C. § 636(c). (See ECF No. 11.)

For the reasons explained below, plaintiff's motion is granted, the decision of the Commissioner of Social Security ("Commissioner") is reversed, and the matter is remanded for further proceedings.

### PROCEDURAL BACKGROUND

In June of 2017 plaintiff filed an application for Disability Insurance Benefits ("DIB") under Title II of the Social Security Act ("the Act"), alleging disability beginning on June 15, 2011. (Transcript ("Tr.") at 15, 147-53.) Plaintiff's alleged impairments included degenerative arthritis, a bulging disc, chronic hip pain, anxiety, and carpal tunnel in both hands. (*Id.* at 167.) Plaintiff's application was denied initially, (*id.* at 85-89), and upon reconsideration. (*Id.* at 92-96.)

Plaintiff requested an administrative hearing and a hearing was held before an Administrative Law Judge ("ALJ") on December 9, 2019. (*Id.* at 32-49.) Plaintiff was represented by an attorney and testified at the administrative hearing. (*Id.* at 32-34.) In a decision issued on December 18, 2019, the ALJ found that plaintiff was not disabled. (*Id.* at 28.) The ALJ entered the following findings:

1. The claimant last met the insured status requirements of the Social Security Act on June 30, 2018.

2. The claimant did not engage in substantial gainful activity during the period from her alleged onset date of June 25, 2011, through her date last insured of June 30, 2018 (20 CFR 404.1571 *et seq.*).

3. Through the date last insured, the claimant had the following severe impairments: degenerative disc disease (20 CFR 404.1520(c)).

4. Through the date last insured, the claimant did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, and 404.1526).

5. After careful consideration of the entire record, I find that, through the date last insured, the claimant had the residual functional capacity to perform medium work as defined in 20 CFR 404.1567(c) except postural are frequent.

6. Through the date last insured, the claimant was capable of performing past relevant work as a cafeteria service worker (DOT

311.677-014, light, SVP 3). This work did not require the performance of work-related activities precluded by the claimant's residual functional capacity (20 CFR 404.1565).

7. The claimant was not under a disability, as defined in the Social Security Act, at any time from June 15, 2011, the alleged onset date, through June 30, 2018, the date last insured (20 CFR 404.1520(f)).

(Id. at 17-28.)

On July 28, 2020, the Appeals Council denied plaintiff's request for review of the ALJ's December 18, 2019 decision. (Id. at 1-5.) Plaintiff sought judicial review pursuant to 42 U.S.C. § 405(g) by filing the complaint in this action on September 23, 2020. (ECF. No. 1.)

### LEGAL STANDARD

"The district court reviews the Commissioner's final decision for substantial evidence, and the Commissioner's decision will be disturbed only if it is not supported by substantial evidence or is based on legal error." Hill v. Astrue, 698 F.3d 1153, 1158-59 (9th Cir. 2012). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Sandgate v. Chater, 108 F.3d 978, 980 (9th Cir. 1997).

"[A] reviewing court must consider the entire record as a whole and may not affirm simply by isolating a 'specific quantum of supporting evidence.'" Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006) (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)). If, however, "the record considered as a whole can reasonably support either affirming or reversing the Commissioner's decision, we must affirm." McCarty v. Massanari, 298 F.3d 1072, 1075 (9th Cir. 2002).

A five-step evaluation process is used to determine whether a claimant is disabled. 20 C.F.R. § 404.1520; see also Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). The five-step process has been summarized as follows:

Step one: Is the claimant engaging in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.

Step two: Does the claimant have a "severe" impairment? If so, proceed to step three. If not, then a finding of not disabled is appropriate.

Step three: Does the claimant's impairment or combination of impairments meet or equal an impairment listed in 20 C.F.R., Pt. 404, Subpt. P, App. 1? If so, the claimant is automatically determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five.

Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

The claimant bears the burden of proof in the first four steps of the sequential evaluation process. Bowen v. Yuckert, 482 U.S. 137, 146 n. 5 (1987). The Commissioner bears the burden if the sequential evaluation process proceeds to step five. Id.; Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999).

## APPLICATION

Plaintiff's pending motion argues that the ALJ committed the following three principal errors: (1) the ALJ's treatment of plaintiff's testimony constituted error; (2) the ALJ's treatment of the medical opinion evidence constituted error; and (3) the ALJ failed to develop the record.<sup>3</sup> (Pl.'s MSJ (ECF No. 14) at 6-15.<sup>4</sup>)

### I. Plaintiff's Testimony

The Ninth Circuit has summarized the ALJ's task with respect to assessing a claimant's credibility as follows:

To determine whether a claimant's testimony regarding subjective pain or symptoms is credible, an ALJ must engage in a two-step analysis. First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged. The claimant, however, need not show that her impairment could reasonably be expected to cause the severity of the symptom she has alleged; she need only show that it could reasonably have caused some degree of the symptom. Thus, the ALJ

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<sup>3</sup> The Court has reordered plaintiff's claims for sake of clarity and efficiency.

<sup>4</sup> Page number citations such as this one are to the page number reflected on the court's CM/ECF system and not to page numbers assigned by the parties.

1 may not reject subjective symptom testimony . . . simply because  
2 there is no showing that the impairment can reasonably produce the  
degree of symptom alleged.

3 Second, if the claimant meets this first test, and there is no evidence  
4 of malingering, the ALJ can reject the claimant's testimony about the  
severity of her symptoms only by offering specific, clear and  
5 convincing reasons for doing so . . . .

6 Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007) (citations and quotation marks  
7 omitted). "The clear and convincing standard is the most demanding required in Social Security  
8 cases." Moore v. Commissioner of Social Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002). "At  
9 the same time, the ALJ is not required to believe every allegation of disabling pain, or else  
10 disability benefits would be available for the asking[.]" Molina v. Astrue, 674 F.3d 1104, 1112  
11 (9th Cir. 2012).

12 "The ALJ must specifically identify what testimony is credible and what testimony  
13 undermines the claimant's complaints." Valentine v. Commissioner Social Sec. Admin., 574  
14 F.3d 685, 693 (9th Cir. 2009) (quoting Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595,  
15 599 (9th Cir. 1999)). In weighing a claimant's credibility, an ALJ may consider, among other  
16 things, the "[claimant's] reputation for truthfulness, inconsistencies either in [claimant's]  
17 testimony or between [her] testimony and [her] conduct, [claimant's] daily activities, [her] work  
18 record, and testimony from physicians and third parties concerning the nature, severity, and effect  
19 of the symptoms of which [claimant] complains." Thomas v. Barnhart, 278 F.3d 947, 958-59  
20 (9th Cir. 2002) (modification in original) (quoting Light v. Soc. Sec. Admin., 119 F.3d 789, 792  
21 (9th Cir. 1997)). If the ALJ's credibility finding is supported by substantial evidence in the  
22 record, the court "may not engage in second-guessing." Id.

23 Here, the ALJ recounted plaintiff's testimony as alleging that "she is unable to work due  
24 to back and neck pain. She claims she can sit for only 20 minutes, cannot stand for very long, and  
25 can walk only one-quarter of a mile. She also claims she cannot lift more than five pounds, and  
26 has difficulty with postural activities." (Tr. at 21.)

27 The ALJ found that plaintiff's medically determinable impairments could reasonably be  
28 expected to cause the symptoms alleged, but that plaintiff's statements concerning the intensity,

1 persistence, and limiting effects of those symptoms were “not entirely consistent with the medical  
2 evidence and other evidence in the record for the reason explained in [the] decision.”<sup>5</sup> (Id.)

3 Although the ALJ attempted to support this finding in some detail the ALJ’s analysis is  
4 nonetheless replete with impermissible and erroneous conclusions.

5 For example, the ALJ found that plaintiff’s “activities of daily living appear to be less  
6 limited than would be expected given her allegations of disability symptoms and limitations.”  
7 (Tr. at 24.) In support of this conclusion the ALJ referred to plaintiff’s ability to “attend[] to her  
8 personal needs (i.e. hygiene),” prepare meals, do “housework for up to an hour,” leave “the house  
9 1-2 times a day,” drive, and shop “2-3 times a week.” (Id.)

10 The critical differences between activities of daily living and  
11 activities in a full-time job are that a person has more flexibility in  
12 scheduling the former than the latter, can get help from other persons  
13 ... and is not held to a minimum standard of performance, as she  
would be by an employer. The failure to recognize these differences  
is a recurrent, and deplorable, feature of opinions by administrative  
law judges in social security disability cases.

14 Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012). In this regard, the Ninth Circuit “has  
15 repeatedly asserted that the mere fact that a plaintiff has carried on certain daily activities, such as  
16 grocery shopping, driving a car, or limited walking for exercise, does not in any way detract from  
17 her credibility as to her overall disability. One does not need to be utterly incapacitated in order  
18 to be disabled.” Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001); see also Garrison v.  
19 Colvin, 759 F.3d 995, 1016 (9th Cir. 2014) (citation omitted) (“[I]mpairments that would  
20 unquestionably preclude work and all the pressures of a workplace environment will often be  
21 consistent with doing more than merely resting in bed all day.”).

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22 <sup>5</sup> “ALJs routinely include this statement in their written findings as an introduction to the ALJ’s  
23 credibility determination” before “identify[ing] what parts of the claimant’s testimony were not  
24 credible and why.” Treichler v. Comm’r of Soc. Sec. Admin., 775 F.3d 1090, 1103 (9th Cir.  
25 2014). “The use of this generic language is not itself reversible error . . . but it inverts the  
26 responsibility of an ALJ, which is first to determine the medical impairments of a claimant based  
27 on the record and the claimant’s credible symptom testimony and only then to determine the  
28 claimant’s RFC. By rejecting a claimant’s subjective symptoms ‘to the extent they are  
inconsistent with the above residual functional capacity assessment,’ the agency indicates that it  
is failing properly to incorporate a claimant’s testimony regarding subjective symptoms and pain  
into the RFC finding, as it is required to do.” Trevizo, 871 F.3d at 679 n.6.

1 The ALJ also noted that plaintiff's "hobby was horses," and that in "2014-15 . . . she  
2 worked at a horse ranch when her pain allowed." (Tr. at 24.) That plaintiff had a "hobby" and  
3 engaged in some type of "work" when "pain allowed" does not explain how such activity was  
4 inconsistent with plaintiff's testimony. Cf. Joly v. Astrue, 357 Fed. Appx. 937, 938 (9th Cir.  
5 2009) (activities "including mowing heavy grass, owning and caring for a horse (including  
6 cleaning the stall and barn), and fixing fence posts" inconsistent with disability testimony).

7 The ALJ also relied on a finding that plaintiff "reported working as a pawnbroker in early  
8 2018." (Tr. at 24.) However, the citation offered by the ALJ to support this finding states that it  
9 was plaintiff's husband who was "working as a pawn broker[.]" (Id. at 304.) The ALJ also  
10 asserted that plaintiff's treatment was "routine and conservative," and that a "treatment note from  
11 late 2016 indicated that the claimant had been bowling recently." (Id.) The treatment noted cited  
12 by the ALJ, however, was from January of 2016, indicated that plaintiff "fell recently while  
13 bowling," and reflects that plaintiff's pain treatment at that time included "Norco" and  
14 "Fentanyl."<sup>6</sup> (Id. at 311-12.)

15 The ALJ acknowledged that plaintiff testified that the "she was unable to obtain additional  
16 treatment due to financial barriers." (Id. at 24.) The ALJ was "not persuaded" that plaintiff's  
17 failure to obtain additional treatment was "entirely related to the alleged financial barriers." (Id.)  
18 In this regard, the ALJ found that plaintiff's "ability to afford alcohol on a daily basis and to care  
19 for several pets strongly suggest[ed] that the claimant could have afforded at least some  
20 additional treatment[.]" (Id.)

21 However, the record reflects that plaintiff's daily alcohol consumption varied between "1-  
22 2 glasses," "2 ounces," "3-4 shots." (Id. at 273, 284, 593.) Plaintiff's pet care appears to have  
23 consisted of "keeping a parrot and two dogs." (Id. at 24.) In the absence of any further  
24 specificity, it is entirely unclear how the unidentified cost of those endeavors is anywhere near  
25 comparable to the cost of healthcare treatment. See Gamble v. Chater, 68 F.3d 319, 321 (9th Cir.

26 \_\_\_\_\_  
27 <sup>6</sup> "[A] Fentanyl patch is heavy duty medication prescribed for chronic pain.  
28 [www.medicinenet.com/fentanyl-transdermal/article](http://www.medicinenet.com/fentanyl-transdermal/article). Fentanyl is not prescribed willy-nilly as  
there are serious potential side effects." Molter v. Astrue, No. CIV S-09-1113 GGH, 2010 WL  
2348738, at \*5 (E.D. Cal. June 8, 2010).



1 1995) (“Disability benefits may not be denied because of the claimant’s failure to obtain  
2 treatment he cannot obtain for lack of funds.”).

3 Finally, much of the ALJ’s analysis relied on finding that plaintiff’s testimony was not  
4 supported by objective medical evidence. (Tr. at 22-24.) However, “after a claimant produces  
5 objective medical evidence of an underlying impairment, an ALJ may not reject a claimant’s  
6 subjective complaints based solely on a lack of medical evidence to fully corroborate the alleged  
7 severity” of the symptoms. Burch v. Barnhart, 400 F.3d 676, 680 (9th Cir. 2005); see also Putz v.  
8 Astrue, 371 Fed. Appx. 801, 802-03 (9th Cir. 2010) (“Putz need not present objective medical  
9 evidence to demonstrate the severity of her fatigue.”); Perez v. Astrue, 247 Fed. Appx. 931, 936  
10 (9th Cir. 2007) (“That the degree of Perez’s subjective complaints were not corroborated by the  
11 objective clinical findings in the ALJ’s view was of no legal moment because pain is inherently  
12 an individual phenomenon.”); Bunnell v. Sullivan, 947 F.2d 341, 347 (9th Cir. 1991) (“If an  
13 adjudicator could reject a claim for disability simply because a claimant fails to produce medical  
14 evidence supporting the severity of the pain, there would be no reason for an adjudicator to  
15 consider anything other than medical findings.”).

16 For the reasons stated above, the Court finds that the ALJ failed to offer a clear and  
17 convincing reason for rejecting plaintiff’s testimony. Accordingly, plaintiff is entitled to  
18 summary judgment on this claim.

### 19 CONCLUSION

20 After having found error, “[t]he decision whether to remand a case for additional  
21 evidence, or simply to award benefits[,] is within the discretion of the court.”<sup>7</sup> Trevizo v.  
22 Berryhill, 871 F.3d 664, 682 (9th Cir. 2017) (quoting Sprague v. Bowen, 812 F.2d 1226, 1232

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23  
24 <sup>7</sup> Having already identified an error requiring remand, in light of plaintiff’s request for remand for  
25 further hearing, and review of the record the Court finds it unnecessary to reach plaintiff’s  
26 remaining claims of error. See Janovich v. Colvin, No. 2:13-cv-0096 DAD, 2014 WL 4370673,  
27 at \*7 (E.D. Cal. Sept. 2, 2014) (“In light of the analysis and conclusions set forth above, the court  
28 need not address plaintiff’s remaining claims of error.”); Manning v. Colvin, No. CV 13-4853  
DFM, 2014 WL 2002213, at \*2 (C.D. Cal. May 15, 2014) (“Because the Court finds that the  
decision of the ALJ must be reversed on the basis of the stooping limitation, the Court need not  
address Plaintiff’s remaining contentions.”).



(9th Cir. 1987)). A case may be remanded under the “credit-as-true” rule for an award of benefits where:

(1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand.

Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir. 2014).

Even where all the conditions for the “credit-as-true” rule are met, the court retains “flexibility to remand for further proceedings when the record as a whole creates serious doubt as to whether the claimant is, in fact, disabled within the meaning of the Social Security Act.” Id. at 1021; see also Dominguez v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) (“Unless the district court concludes that further administrative proceedings would serve no useful purpose, it may not remand with a direction to provide benefits.”); Treichler v. Commissioner of Social Sec. Admin., 775 F.3d 1090, 1105 (9th Cir. 2014) (“Where . . . an ALJ makes a legal error, but the record is uncertain and ambiguous, the proper approach is to remand the case to the agency.”).

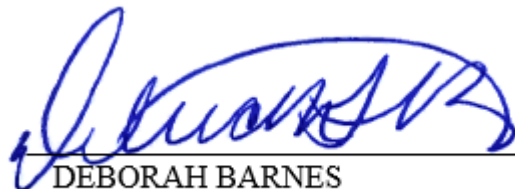
Here, plaintiff argues that this matter should be remanded for further proceedings and the Court agrees. (Pl.’s MSJ (ECF No. 14) at 15.)

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff’s motion for summary judgment (ECF No. 14) is granted;
2. Defendant’s cross-motion for summary judgment (ECF No. 15) is denied;
3. The Commissioner’s decision is reversed;
4. This matter is remanded for further proceedings consistent with the order; and
5. The Clerk of the Court shall enter judgment for plaintiff and close this case.

Dated: February 23, 2022

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DEBORAH BARNES  
UNITED STATES MAGISTRATE JUDGE